

30(b)(6) NPBL by C. Moss - February 14, 2020

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
NORFOLK DIVISION

CSX TRANSPORTATION, INC., )  
Individually and on behalf )  
of NORFOLK & PORTSMOUTH )  
BELT LINE RAILROAD )  
COMPANY, )

Plaintiff, )

V. )

NO. 2:18cv530

NORFOLK SOUTHERN RAILWAY )  
COMPANY, NORFOLK & )  
PORTSMOUTH BELT LINE )  
RAILROAD COMPANY, JERRY )  
HALL, THOMAS HURLBUT, )  
PHILIP MERILLI and CANNON )  
MOSS, )

Defendants. )

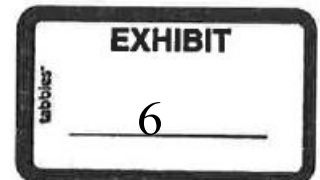
30(b)(6) DEPOSITION UPON ORAL EXAMINATION OF

NPBL by its designee CANNON MOSS

TAKEN ON BEHALF OF THE PLAINTIFF

Norfolk, Virginia

February 14, 2020



1                   We have a union work force, so they  
2                   are -- they don't have a set 40-hour week working nine  
3                   to five.

4                   Q       But they are -- they may be unionized,  
5                   but they are still the Belt Line's employees; correct?

6                   A       Correct.

7                   Q       In other words, you are not bringing in  
8                   people from Local 489 --

9                   A       No.

10                  Q       -- but they are on a 1099 or similar  
11                  basis, okay.

12                           And so what is the business of the  
13                   Belt Line?

14                  A       Our business is to be the first and last  
15                  mile in this area, meaning we get traffic from  
16                  Norfolk Southern and CSX and we provide switching  
17                  services to the 26 customers that we have up and down  
18                  the line.

19                  Q       You said 26 customers.

20                           Is that a number that is fixed by any  
21                  type of agreement, statute or regulation?

22                  A       No.

23                           And we used to have significantly more,  
24                  but they built a highway system, so we lost a couple.

25                  Q       Would the Belt Line -- well, is it one of

1 A Like a transformer on a flat car.

2 Q Okay. Any other occasions you can think  
3 of when the Belt Line has actually taken CSS -- CSX  
4 cars into NIT?

5 A The occasions when we do the dimensional  
6 traffic.

7 Q Right.

8 But is there any other thing that you can  
9 think of which --

10 A No.

11 Q Okay. In 2015 when the trains -- when  
12 CSX trains were being moved directly into NIT by NPBL,  
13 whose locomotives were used?

14 A Our locomotives.

15 Q Did the Belt Line keep a separate record  
16 of the cars and containers that went directly into NIT  
17 in 2015 during that --

18 A I don't believe so.

19 Q Do you recall any problems arising in  
20 2015 with the transport of the CSX trains directly into  
21 NIT?

22 A Problems from who, NS or CSX?

23 Q For the Belt Line.

24 A I mean, yeah, we had some challenges. It  
25 was the first time we had done it.

1           A       It's not a train.

2           Q       Okay. So then you would be going into  
3 Norfolk Southern's Portlock yard with a long train  
4 coming from NIT -- or a long car? Is that the --

5           A       Yeah, if you had a car longer than  
6 73 feet coming from NIT, you would have to go into  
7 Portlock yard.

8           Q       Okay.

9                   (7/31/15 letter of Randall W. Hunt,  
10                   NPBL005634 marked as NPBL Exhibit Number  
11                   21)

12 BY MR. MCFARLAND:

13           Q       Do you recognize the letter that we've  
14 marked as Belt Line Deposition Exhibit 21?

15           A       Yes.

16           Q       Okay. And what did you understand as the  
17 recipient of this letter it to be -- to be conveying to  
18 you by Norfolk Southern?

19           A       It was a year's heads up that our 1917  
20 99-year trackage rights agreement was coming to an end.

21           Q       And what, if any, action did that cause  
22 you to take upon your receipt of this letter?

23           A       We began discussing with Norfolk Southern  
24 a -- a new trackage rights agreement.

25           Q       And, actually, there's two trackage

1 rights agreements at issue; right?

2 A Well, there's the -- yes.

3 Q There's a 1917 and then there's the one  
4 that we were looking at previously.

5 A Correct, the interchange agreement.

6 Q Right.

7 A The 1985 interchange agreement.

8 Q Right.

9 And so after July 31st of 2015, I take it  
10 there were negotiations between NS and the Belt Line?

11 A Yes.

12 Q Okay. And what was the result of those  
13 negotiations, if anything?

14 A I mean, we've -- we've negotiated all  
15 parts of the trackage rights except for the rate per  
16 car that NS wants to charge us.

17 Q And where does that stand, rate per car?

18 A Norfolk Southern has taken us in front of  
19 the Service Transportation Board to mediate the rate.

20 Q And what is the rate that  
21 Norfolk Southern wants to charge?

22 A Seventy dollars a car.

23 Q And what is the rate that the Belt Line  
24 thinks is the appropriate rate?

25 A Thirty dollars a car.

1 Q And I take it it's pending with the STB  
2 right now?

3 A Correct.

4 Q Is there any expected resolution date?

5 A From what I understand, the STB has  
6 punted to this lawsuit.

7 Q Okay. How did NPBL arrive at the, I  
8 think you said \$30 a car rate?

9 A Sure.  
10 We looked at what we were paying  
11 historically on a per car basis running up there and  
12 then reduced that by a couple dollars and presented  
13 \$30.

14 Q Okay. And why did you reduce it by a  
15 couple dollars?

16 A You got to start -- why not.

17 Q Okay.

18 A Why offer to pay more money.

19 Q Sure. I am just asking. Okay, fair  
20 enough.

21 And -- but was the -- putting aside that  
22 you -- well, what had you been paying under the old  
23 agreements?

24 A There's several joint facility agreements  
25 that make up what we pay Norfolk Southern to run on

1 that line.

2 So what's -- which one specifically are  
3 you asking me about?

4 Q Well, it sounds like, I mean, we've got  
5 it down to at least going forward it's Norfolk Southern  
6 wants \$70 a car and you're offering \$30 a car; right?

7 A Correct.

8 Q Okay. So what had you been paying  
9 before? What was the 30 -- what was before the \$30  
10 that you're now offering? Was it, I don't know, 50?

11 A Sure.

12 Q 40?

13 A With the 1917 agreement, we were  
14 basically paying \$8 a car, but we had fixed costs built  
15 into that agreement among some other joint facilities  
16 agreements which are about a hundred thousand dollars  
17 worth of fixed costs that would then get spread across  
18 all the cars that we ran up there.

19 Q Okay. So what did -- what did, under the  
20 old agreements, what did the per car cost come to for  
21 NPBL? What were you, in a sense, paying NS?

22 MR. CHAPMAN: Object to the form.

23 THE WITNESS: Which year?

24 BY MR. McFARLAND:

25 Q Well, let's use 2014.

1 railroad, we're more than happy to work with them and  
2 develop -- help them develop a facility.

3 (3/23/18 letter of Tony DiDeo,  
4 CSXT0101884-89 marked as NPBL Exhibit  
5 Number 31)

6 BY MR. McFARLAND:

7 Q Are you familiar with what we've marked  
8 as Belt Line Exhibit Number 31?

9 A Yes.

10 Q Okay. Did you receive this letter from  
11 Mr. DiDeo back in March of 2018?

12 A Yes.

13 Q Okay. And after receipt of this letter,  
14 what, if any, actions did you take as to it?

15 A We discussed it internally and discussed  
16 the opportunity with the port, talked to  
17 Norfolk Southern about how we could do it.

18 We, Donna and I, reviewed the rate and  
19 we're going to make a recommendation to the board.

20 Q I'm sorry?

21 A And we made -- actually we made a  
22 recommendation to the board for a rate committee.

23 Q Okay. So let's take it in part.

24 When it came in, you said you reviewed it  
25 internally at the -- at NPBL?



1 A Correct.

2 Q And did you review it with Miss Coleman?

3 A Yes.

4 Q And anyone else?

5 A No, just Miss Coleman.

6 Q Not Mr. --

7 A Probably Mr. O'Brien as well, yes.

8 Q All right. And from the NPBL's  
9 management perspective, what were the thoughts on the  
10 proposals from CSX?

11 A While we welcomed the opportunity to  
12 handle their business, there were some challenges with  
13 it in terms of the rate that they had proposed, but if  
14 they wanted to send it to us, we would have handled it  
15 at our current rate.

16 Q Well, at the current rate. You're saying  
17 at the \$210?

18 A Correct.

19 Q But this proposal has a different rate  
20 structure; correct?

21 A Correct.

22 Q Okay. Did the Belt Line perform any  
23 analysis of the CSX rate structure and what it might  
24 mean for the Belt Line in terms of its revenues and  
25 profits?

1           A       Yes.

2           Q       And what was the result of the  
3 Belt Line's analysis?

4           A       We didn't think that the proposed rate  
5 would make sense for us. I mean, it -- there were some  
6 problems with the rate they proposed. We didn't know  
7 what we were going to be paying Norfolk Southern for  
8 trackage rates; we couldn't do an in-depth analysis.

9                   The other aspect is if we gave a rate of  
10 this magnitude to CSX, then our other largest customer  
11 that handled 18,000 carloads would probably want the  
12 same one, so we'd lose revenue from that aspect.

13                   But that's why we proposed to the board  
14 if they want to seriously look at it, to have a rate  
15 committee to look at our rates.

16           Q       Okay. So is the recommend- -- the  
17 official recommendation from management to the board  
18 was to have a rate committee look at this proposal?

19           A       That's the message I relayed to the  
20 board.

21           Q       Okay. And what was the board's response  
22 to that message?

23           A       There was no interest from either side to  
24 have a rate committee.

25           Q       When you say "either side"...

1 better deal than trucking a container over from PMT to  
2 NIT.

3 So with market conditions, we were  
4 cheaper.

5 And looking at the overall rate, again,  
6 we had so many questions about trackage rights,  
7 trackage rights cost, that we couldn't -- in the  
8 current state, we were able to look at it and say it  
9 didn't add that much revenue but put in the question  
10 mark factor of how much per car we were going to end up  
11 paying NS. If NS got \$70 a car, it would have  
12 definitely not made any sense for this proposal.

13 Q Well, was there any discussion with NS as  
14 to what it might charge under this proposal or in light  
15 of this proposal?

16 A What do you mean conversation with NS?

17 Q Did you discuss -- after this proposal  
18 came in from CSX, were there any discussions by the  
19 Belt Line management with NS?

20 A We talked about how operationally it  
21 would work out.

22 Q Okay.

23 A I believe I reached out to the joint  
24 facilities folks to say can we try to work on the rate,  
25 but that's -- that's about it. We didn't talk to

1 came to understand that CSX was trying to make it clear  
2 that what the letter was really proposing was not a  
3 contract but rather a tariff? Was there ever a time  
4 when they tried to make that clear to you?

5 A No.

6 MR. WINGFIELD: No further questions.  
7 Thank you.

8 MR. CHAPMAN: I've just got a couple of  
9 follow-up questions.

10

11 EXAMINATION

12 BY MR. CHAPMAN:

13 Q Mr. McFarland asked you a number of  
14 questions related to the governance of the Belt Line  
15 and what committees existed and that sort of thing, and  
16 there's been a lot of conversation or questions about a  
17 rate committee.

18 Is the rate committee a standing  
19 committee of the Belt Line?

20 A No.

21 Q And under what circumstances would it  
22 exist or be called for? How would that come about?

23 A It would be at the request of the board  
24 of directors.

25 Q Okay. And in response to the 2018

1 proposal from CSX for this private contract rate, did  
2 the board -- did anybody on the board ever move in  
3 response to management's recommendation that a rate  
4 committee be established to evaluate the Belt Line's  
5 tariff?

6 A No.

7 Q Did the Belt Line ever reject the  
8 proposal made for a private contract by CSX?

9 A No.

10 Q You were asked a number of questions by  
11 Mr. McFarland related to the arrangements under which  
12 the Belt Line leases locomotives from Norfolk Southern.

13 And I think your testimony was that that  
14 arrangement has been in place since sometime in the  
15 late 1980s by agreement of the owning railroads; is  
16 that right?

17 A Correct.

18 Q As far as the Belt Line is concerned, is  
19 it using its own locomotive power when utilizing those  
20 locomotives that it leases from Norfolk Southern?

21 A Yes.

22 Q Has Norfolk Southern ever painted those  
23 locomotives to have Norfolk & Portsmouth Belt Line  
24 identification or markings on them?

25 A Yes.

1 that is, they have an interest in one of those three  
2 companies?

3 A Correct.

4 Q By virtue of employment or otherwise?

5 A Correct.

6 Q I think you were asked some questions  
7 about the relative ownership of the stock of the  
8 Belt Line, and I think you described it that  
9 Norfolk Southern owns 57 percent and is the, I'll call  
10 it, the majority stockholder of the company; is that  
11 right?

12 A Correct.

13 Q By virtue of its majority interest, from  
14 your perspective as a director and an officer of the  
15 Belt Line, does that mean that Norfolk Southern has the  
16 ability to control the Norfolk & Portsmouth Belt Line?

17 A They have -- yes, they have more votes on  
18 the board.

19 Q Norfolk Southern does?

20 A Norfolk Southern does, yes.

21 Q The traffic that was moved for CSXT to  
22 NIT in 2015 occurred over a period of a couple of  
23 months; is that right?

24 A Yes.

25 Q And was the Norfolk & Portsmouth

1 Belt Line able to deliver all of the traffic that CSXT  
2 wanted delivered to NIT during that period?

3 A Yes.

4 Q And was the Norfolk & Portsmouth  
5 Belt Line able to handle all of the traffic that came  
6 out of NIT that CSXT wanted handled during that period?

7 A Yes.

8 Q You were asked some questions related to  
9 the sale by the Belt Line of the property located at  
10 Sewells Point, the Sewells Point area of Norfolk which  
11 is up in the vicinity of Norfolk International  
12 Terminals in the City of Norfolk, and I want to make  
13 sure I understand.

14 Did you indicate that or testify that CSX  
15 in fact objected to that sale in 2009?

16 A I would need to see the meeting minutes.  
17 I wasn't -- I wasn't on the -- at the company at the  
18 time.

19 Q I do not have an extra copy of these with  
20 me, but I do have a set of the unanimous consents  
21 signed by each of the six directors of the company in  
22 2008 regarding the sale of that property for the  
23 purchase price of \$5.1 million to the Virginia Port  
24 Authority. And I realize you've had to look at a lot  
25 of documents related to getting ready for this